



INTERIOR BOARD OF INDIAN APPEALS

Cherokee Nation v. Muskogee Area Director, Bureau of Indian Affairs

29 IBIA 17 (12/15/1995)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

CHEROKEE NATION

v.

ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-100-A, 94-108-A

Decided December 15, 1995

Appeal from a decision to assign to an individual Indian a beneficial interest in land held in trust by the United States.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Generally

The Board of Indian Appeals is not a court of general jurisdiction, but has only that authority delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of a deed to trust land or to rewrite such a deed.

2. Indians: Trust Responsibility

The specific circumstances of each case will determine whether the Federal trust responsibility is owed to an Indian tribe, an individual Indian, or both.

APPEARANCES: David A. Mullon, Jr., Esq., and L. Susan Work, Esq., Tahlequah, Oklahoma, for appellant; M. Sharon Blackwell, Esq., and Keith S. Francis, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Cherokee Nation seeks review of two decisions issued by the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), on March 11 and March 28, 1994. The decisions concern the assignment of Tract #56, which was acquired under BIA's Scattered Tracts Project, to Byron Merlin John Whaler. Because of the similarity of issues, these cases have been considered with Cloud v. Acting Muskogee Area Director, Docket No. IBIA 94-106-A, also decided today. See 29 IBIA 31. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the decisions.

Background

According to the administrative records in these cases and in Cloud, the Scattered Tracts Project was a BIA land acquisition project undertaken in the 1940's to assist Indian families of the Five Civilized Tribes. Portions of the allotments made to members of these tribes were not tax-exempt. Some allottees were unable to pay taxes on the non-tax-exempt portions of their allotments. Tracts with delinquent taxes were sold at tax auctions. Under authority of the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. §§ 501-509 (1994), 1/ BIA used appropriated funds to purchase a number of these tracts. The purchase price for the tracts was not fair market value, but was only an amount sufficient to discharge the outstanding liens and encumbrances, and to cover the costs of conveying title. It appears that there are presently nine tracts within appellant's treaty area which were purchased under the Scattered Tracts Project and conveyed to the United States by deeds with language similar to that in the deed at issue here.

The present appeals involve Tract #56, described as the W $\frac{1}{2}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$, less 1 acre for a cemetery; SE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 35, T. 18 N., R. 23 E., Indian Base and Meridian, Cherokee County, Oklahoma, consisting of 249 acres, more or less. The tract was part of the taxable allotment of Eli Whaler, Fullblood Cherokee Roll No. 19982. At some time before or during 1942, Eli failed to pay property taxes. The tract was acquired by the United States at the county's August 31, 1942, tax sale.

An August 31, 1942, deed conveys the tract from Eli and his wife, Dora, to:

The United States in trust for John Henry Whaler, an Indian of the Cherokee Tribe, during his lifetime, then in trust for the Cherokee Tribe of Oklahoma, until such time as the use of the land is assigned by the Secretary of the Interior to a cooperative group organized under the [OIWA], or to an individual Indian, then in trust for such group or individual.

John was Eli's son. John died on or about February 18, 1989, and was survived, inter alia, by his only sister, Naomi Whaler Willis. By letters dated October 14, 1990, and April 12, 1991, Naomi asked the Area Director to assign the tract to her.

On June 7, 1991, the Area Director wrote appellant, stating:

Mrs. Naomi Whaler now Willis * * * has requested an assignment of a tract in Cherokee County held in trust status for her brother, John Henry Whaler * * * during his lifetime. * * *

* * * * *

1/ All further citations to the United States Code are to the 1994 edition.

It was originally intended that the beneficial title to each tract [acquired under the Scattered Tracts Project] would ultimately be vested in a cooperative group or an individual Indian, and the deeds give the Secretary authority to assign the land to an individual Indian immediately upon the death of a life tenant.

* * * * *

Although [appellant] has only a beneficial use until the land is assigned, and the Secretary has authority to make assignments of the tracts involved, we would appreciate receiving an expression from the tribe, in resolution form, for our use in considering [the] request and in connection with the potential assignment of the remaining tracts held in such status.

(Area Director's June 7, 1991, Letter at 2).

On July 13, 1992, appellant adopted Tribal Resolution No. 70-92, which resolved:

[T]hat the surface estate of those tracts of land known as the "Scattered Tracts" be conveyed to the living life tenant in those situations where those tracts are presently occupied as homesites by the living life tenants, their immediate family members, or the judicially determined heirs of said life tenants. Present occupation of the land as a homesite shall mean that an established homesite exists at the time of the enactment of this resolution.

BE IT FURTHER RESOLVED that, to the fullest extent possible by federal law, the tracts so conveyed remain in a trust or restricted status following said conveyance.

BE IT FURTHER RESOLVED that the Cherokee Nation requests the balance of said "Scattered Tracts" be conveyed U.S.A. in trust for the Cherokee Nation as such life tenancy terminates.

This resolution was transmitted to the Area Director on July 20, 1992.

An April 15, 1993, internal tribal memorandum concerning the scattered tracts was furnished to the Area Director by appellant. Among other things, the memorandum states that "the Secretary of the Interior is empowered to act upon this [presumably Naomi's] request with or without the Tribe's consent" (Memorandum at unnumbered 2).

The Area Director wrote appellant again on August 6, 1993. He stated:

The question of assigning the Scattered Tracts is one which I have had under consideration for quite some time. There are no regulations or procedures under which to evaluate these requests. Because such an assignment would affect [appellant's] tribal land

base, I asked you for a recommendation on the proposed assignments. [Appellant] has gone to great lengths to arrive at a satisfactory solution to this question. A series of Tribal Council meetings and public hearings were held before they finally passed [Resolution No. 70-92].

In addition to looking to [appellant] for input, I also looked to what I consider to be the closest available [BIA] guidelines, those being the fee-to-trust land acquisition review factors found under 25 CFR 151.10.

Of these factors, the applicable ones are (a) the authority for the assignment; (b) the need for the land; (c) the purpose it would be used for; (d) the amount of trust or restricted land already owned and the degree of assistance needed in handling his/her affairs; and (f) any problems and potential conflicts of land use.

I am satisfied that the Council thoroughly considered the question of these assignments and arrived at as fair a set of criteria for determining the eligibility for assignment as can reasonably be expected. While I respect the decision of the Council and the effort they took in arriving at it, I cannot accept their recommendation as a blanket policy for evaluating the requests for the remaining Scattered Tracts lands.

Given the unique history of the Five Civilized Tribes of Oklahoma, the land allotment system imposed upon them, and the subsequent disgraceful way many of the allottees were divested of their allotments, I believe discretion in taking into consideration other factors when determining which tracts to assign is necessary and justified. I understand [appellant's] concern over transferring land from tribal use into individual ownership and the potential for future difficulties created by fractionated inherited interests. However, I believe due consideration will be given to those concerns during my review. * * *

I cannot say at this time how much weight I will give to each factor or whether a particular finding must be made on every factor. Each request will be evaluated individually on its own merits and set of circumstances. I may also find it necessary to request additional information or justification to enable me to reach a decision.

As to the question of assignments to undetermined heirs of deceased life tenants, the deeds provide for assignment to any individual Indian which makes it unnecessary to probate the estate unless there was some question over the identity of the heirs. I also do not believe that conveying the mineral

estate is necessary for the full enjoyment of the assignees; therefore, I do not intend to include it in my consideration for assignment.

(Area Director's Aug. 6, 1993, Letter at 2-3).

By letter of November 30, 1993, Byron requested that the Area Director assign Tract #56 to him. Byron stated that he was the only child of John and his wife, Ruth, and that he had strong ties to the property and wished to return to the property and build his own home. Byron's statement that he was the only child of John and Ruth was confirmed by a Proof of Death and Heirship form which Naomi had completed and filed with BIA on or about June 6, 1991.

On March 11, 1994, the Area Director notified Byron that the tract was being assigned to him. The letter states:

[Appellant] possesses a contingent interest in the property * * *.

Implicit in the legislative history of OIWA and the language of the * * * grantee clause from the deed, is the discretionary authority of the Secretary to further assign all such lands purchased with federally appropriated OIWA funds to accomplish the purposes of OIWA. You have requested the lands be assigned to you so that you can continue with plans to return to the land where your parents were born and establish a home. The status of title was apparently not clear to you in the past.

In this regard I find that authority exists for the assignment. Also, I find that based on available information a need for the lands exists, and that the land is currently being utilized for the purposes set forth in OIWA, i.e., agricultural, homesite, and community purposes. It is noted the Land Consolidation Plan of [appellant] does not indicate this property is a key tract in [appellant's] use plan.

Given the uncertainty involving the income from the mineral ownership and the fact that I do not believe the mineral estate is necessary for the full enjoyment of the property for its intended use, the assignment will include the surface interest only. An assignment document to effect the conveyance will be prepared and forwarded to [appellant].

(Area Director's Mar. 11, 1994, Letter at 1-2). This letter shows service on appellant's Principal Chief and Realty Director.

By letter of March 17, 1994, the Area Director directly notified appellant of his decision, and transmitted a March 10, 1994, Proclamation effecting the assignment. Naomi was informed that the tract had been assigned to Byron by letter dated March 28, 1994.

Appellant appealed from both the March 11 and March 28, 1994, letters. Only appellant and the Area Director participated in the appeals. The appeals were stayed from June 22, 1994, through March 30, 1995, while the parties attempted to negotiate a settlement.

Discussion and Conclusions

The Board first addresses appellant's argument that the

Area Director's reliance on language in Eli Whaler's 1942 deed for authority to assign away the Nation's trust lands is entirely misplaced. Neither Eli Whaler, in executing the trust deed, nor the Secretary in accepting the land in trust, could create a private exception to the law prohibiting alienation of tribal trust land without express authority to do so from the Congress of the United States.

(Opening Brief at 9).

Appellant expands on this argument in its reply brief, 2/ alleging that the nature of its interest in Tract #56 as created in the deed is "irrelevant" because BIA's acceptance of the deed as written was "a violation of the federal trust responsibility to Indian nations" (Reply Brief at 3), and that "[t]he United States should not have accepted this deed in its present form, because the deed purports to give the Secretary discretionary authority to remove trust property from tribal ownership" (Id. at 4), and "purports to authorize a trustee (the Secretary of the Interior) to assign the interest of a beneficiary ([appellant]) to a third party at some undefined future date which is not dependent on a condition subsequent, special limitation or executory limitation." Id. at 3, n.2.

[1] This argument appears to challenge the validity of the deed and/or of the title taken under it. The Board is not a court of general jurisdiction, but has only the authority delegated to it by the Secretary. It has not been delegated authority to determine the validity of a deed, or to rewrite a deed. To the extent appellant is challenging the validity of the deed, the Board lacks jurisdiction to consider its arguments. See

2/ Several of the arguments presented in appellant's reply brief are either apparently new arguments or considerable expansions of arguments mentioned in its opening brief. The Board has frequently stated that it is not required to consider arguments and issues raised for the first time in a reply brief. See, e.g., Winlock Veneer Co. v. Juneau Area Director, 28 IBIA 149, 157, recon. denied, 28 IBIA 220 (1995), and cases cited therein. It appears likely that the differences between the opening brief and the answer brief in this case relate to the fact that the briefs were filed by different counsel. Because it is difficult to say, however, that the new and/or expanded arguments presented in the reply brief were not at least alluded to in earlier filings, albeit with little or no development, the Board has determined to consider all of the arguments.

and compare Leon v. Albuquerque Area Director, 23 IBIA 248 (1993); Foutz v. Acting Navajo Area Director, 21 IBIA 273, 277 (1992); Tsosie v. Navajo Area Director, 20 IBIA 108, 114 (1991). If appellant believes the deed is invalid, it may raise this issue in Federal court.

The Board proceeds with its review of this matter under the assumption that the deed is valid as written.

The Area Director contends that this case is controlled by Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, 19 IBIA 296 (1991), and that the Board held there that BIA's assignment authority, under deeds like the one at issue here, is discretionary. ^{3/} Kialegee, one of three Creek tribal towns separately organized under the OIWA, had requested, *inter alia*, that certain lands in McIntosh County, Oklahoma, be assigned to it. Kialegee stated that title to the lands was held by the United States "in trust for the Creek Tribe [Muskogee (Creek) Nation] until such time as the use of the land is assigned by the Secretary of the Interior to a tribe, band, or cooperative group organized under the [OIWA], or to an individual Indian, then in trust for such tribe, band, group, or individual" (19 IBIA at 303). Kialegee contended that the lands were originally acquired for it and that BIA had authority to assign them to it.

The deed language quoted in Kialegee is quite similar to the language of the present deed. The Board agrees with the Area Director that it held the language of the Kialegee deed gave BIA discretion concerning the assignment of the lands. However, the primary issue in this part of Kialegee was whether BIA could require the consent of the Muskogee (Creek) Nation before assigning land to another tribe. The Board held that BIA had discretion to require such consent. Because of the different circumstances and focus of Kialegee, the Board deems it appropriate to consider the language of the 1942 deed fully here.

Appellant's major argument is that the Department lacked authority to assign Tract #56 out of tribal ownership. This argument, and several subsidiary arguments premised on it, are based on appellant's conclusion that it acquired a vested interest in the tract when the deed was executed, and that, when the life tenant died, the full beneficial interest in the tract merged in appellant, without any limitations or restrictions. Appellant argues that it now "owns" the tract, which cannot be taken away from it.

The Area Director concedes that appellant's interest in Tract #56 is a "vested" remainder, but argues that the interest is subject to complete defeasance through the exercise of the authority given to the Secretary in the deed to assign the tract to an OIWA cooperative organization or an individual Indian. ^{4/}

^{3/} Present appellant appeared in Kialegee as an amicus curiae.

^{4/} Because this assignment was to an individual Indian, hereafter the Board will not refer to a possible assignment to an OIWA cooperative organization. This analysis, however, would apply equally to any such organization.

A remainder vested subject to complete defeasance is defined similarly in every property law treatise which the Board consulted. For example, section 4.35 of American Law of Property (1952), states:

The term "remainder vested subject to complete defeasance" is almost self-explanatory. It possesses, first, the universal characteristic of the vested remainder in that throughout its continuance it is ready to take effect in possession or enjoyment however and whenever the prior estates terminate. Second, it is subject to possible or certain termination. This termination may take place either before, at, or after the termination of the prior estates. Thus, the remainder may be in fee simple subject to being terminated by an executory interest, a power of appointment, a power of revocation, or a right of entry for condition broken.

See also C. Moynihan, Introduction to the Law of Real Property, 120 (1985): "A remainder is vested subject to complete divestment when the remainderman is in existence and ascertained and his interest is not subject to a condition precedent but his right to possession and enjoyment on the expiration of the prior interest is subject to termination by reason of an executory interest, or a power of appointment, or a right of entry;" Restatement of Property § 157(p) (1936):

When a remainder is vested subject to complete defeasance it is possible to point to a person and to say such person would take, if all interests including a prior right to a present interest should now end. * * * But the person thus clearly identified has no certainty of retaining such present interest as he may acquire and commonly has no certainty of ever acquiring any present interest in the affected thing. These uncertainties can be caused by any one of several factors. * * * The remainder may be created so as to terminate in accordance with the term of a special or executory limitation * * *, or by an exercise of a power had by some person.

Appellant criticizes the Area Director's citation of the 1936 edition of the Restatement of Property. The Board finds no evidence that the law of property as it relates to the definition and classification of future interests has changed significantly in the past 60 years. However, considering that the deed at issue was executed in 1942, reference to a contemporaneous treatise on the law of property does not appear inappropriate.

Appellant also observes that the Area Director omitted the examples of vested remainders subject to complete defeasance given in the 1936 Restatement, and argues that none of the examples of such an interest given in a more recent property law treatise are directly on point. Appellant suggests that the Area Director may have incorrectly characterized its interest.

In view of the fact that, in the Board's experience, few, if any, general treatises on any area of law deal with the special problems in Indian

law, the Board finds unpersuasive the fact that no examples exactly like the deed at issue were given in a general treatise on the law of property. Nonetheless, the Board concludes that Illustration 13 in § 157 of the 1936 Restatement is closely analogous to the deed at issue. That illustration states:

A, owning Blackacre in fee simple absolute, transfers Blackacre "to B for life, remainder as B shall appoint, but in default of, and until appointment, to C and his heirs." C has a remainder vested subject to complete defeasance.

There are two differences between this illustration and the 1942 deed. First, the authority to appoint a different remainderman in the illustration is given to the life tenant, rather than to a third party as in the deed at issue. Second, the vested remainderman in the illustration is listed last, rather than first as in the deed. These are differences without a distinction.

The Board concludes that appellant's interest under the 1942 deed is a vested remainder subject to complete defeasance through the exercise of the authority given to the Secretary to assign the tract to an individual Indian. The deed therefore gave appellant an estate which was limited by the Secretary's express authority to assign the tract, and which would terminate when the Secretary exercised that authority. Appellant's interest in, or "ownership" of, the tract existed only until such time as the Secretary assigned the tract to an individual Indian. The deed gave appellant no reasonable expectation that it would always own the remainder interest, could prevent the Secretary from assigning the tract, or could control how the Secretary decided to assign the tract. ^{5/} Appellant received the interest in the tract to which it was entitled, *i.e.*, the right to use the tract until such time as the Secretary assigned it to an individual Indian. The Secretary's assignment of the tract did not, therefore, deprive appellant of any property right. Consequently, the Board rejects appellant's argument that the assignment violates 25 CFR 152.22 and 25 U.S.C. §§ 177, 461, and 501; ^{6/} and that it constitutes a "taking" without just compensation.

^{5/} The Board is aware, especially from documents in the administrative record in Cloud, that at least some BIA officials apparently had some question about their authority to assign tracts acquired under the Scattered Tracts Project and had stated that an act of Congress was necessary to transfer the remainder interest to an individual Indian. The origin of this belief is not explained. The Board sees no basis for the belief in the deed, the general law of property, or Indian law. To the extent that this decision can be seen as a departure from a prior administrative interpretation of law, the reason for the change is fully set forth in this decision. Hopi Indian Tribe v. Director, Office of Trust and Economic Development, 22 IBIA 10, 16 (1992), and cases cited therein.

^{6/} The Board notes that appellant's argument in this appeal is somewhat inconsistent with its Resolution No. 70-92, quoted supra. The inconsistency

The next major question is whether the authority to assign the remainder interest was properly exercised. This authority appears to be a power of appointment. A power of appointment is defined in section 318(1) of the Restatement of Property (1940) as "a power created or reserved by a person (the donor) having property subject to his disposition enabling the donee of the power [person to whom the power is given] to designate, within such limits as the donor may prescribe, the transferees of the property or the shares in which it shall be received." The donee of the power is given discretion in determining how to exercise the power, within any limits established by the donor and/or any relevant laws:

The utility of a power of appointment is the flexibility of disposition which is attained by lodging in the donee of the power a discretion as to the ultimate recipients of the donor's property. This discretion derives from the donor and * * * may be as broad or as narrow as the donor wishes.

(American Law of Property § 23.11).

The deed limits the Secretary's discretion only by designating the class of persons to whom the remainder interest could be assigned. However, the Board holds that, as in all Indian matters, the Secretary's discretion is also limited by the Federal trust responsibility.

Appellant does not dispute that Byron is within the class of persons to whom the remainder interest may be assigned. However, it argues that the Area Director erred in assigning the tract to Byron without a judicial heirship determination. Both Byron and Naomi stated that Byron was John and Ruth's only child. For Naomi, this statement constituted an admission against her personal interest. Appellant does not directly contest the alleged relationship.

The deed allows the Secretary to assign the tract to any individual Indian, not just to an heir, or even a relative, of the life tenant. It is, however, within the Secretary's discretion to determine that a particular assignment should be made only to a relative or heir of the life tenant. Under the circumstances of this case, in which there was no requirement that the individual Indian to whom the tract was assigned be an heir of the life tenant, the person challenging the assignment would normally lack standing to initiate or contest an heirship determination, and the family members involved agree on the relationship, the Board cannot conclude that the Area Director erred in making his decision without a formal judicial heirship determination.

fn. 6 (continued)

arises insofar as appellant contends here that assignment of the tract is precluded by statute, in particular 25 U.S.C. § 177, whereas it has supported conveyance of certain other "Scattered Tracts," for which the same legal impediment would ostensibly apply.

Appellant argues that the decision violates the trust responsibility owed to it because when the decision was made, "the land was held by the United States in trust for [appellant]. Even though no trust responsibility was owed to Byron Whaler with respect to this particular tract of land, the * * * Area Director assigned land belonging to the beneficiary of an express trust relationship to an individual to whom no trust duty was owed." Opening Brief at 10-11. Appellant argues that the "decision in effect ignored the [Federal] government's trust responsibility to [appellant] and instead focused on the benefits that would accrue to one to whom no trust was owed as to this tract of land." Opening Brief at 11-12. Appellant cites several Federal court cases in support of its arguments that the trust responsibility runs to Indian tribes and that Congressional intent to terminate the trust relationship must be clearly expressed.

[2] The trust responsibility is owed to both Indian tribes and individual Indians. The circumstances of each case will determine whether the trust responsibility is owed to a tribe, an individual, or both. See, e.g., Muscogee (Creek) Nation v. Muskogee Area Director, 28 IBIA 24 (1995); Adams v. Billings Area Director, 28 IBIA 20 (1995); Kwethluk IRA Council v. Juneau Area Director, 26 IBIA 262 (1994).

The question before the Area Director was whether Tract #56 should be assigned to an individual Indian or whether he should refrain from exercising the power of appointment, thereby leaving the tract with appellant. The Board finds irrelevant both the fact that Tract #56 was not held in trust for Byron at the time of the Area Director's decision and the fact that appellant was designated to be the remainderman pending the Secretary's exercise of his power of appointment. While BIA owed a trust responsibility to appellant with respect to this tract while the tract was held for appellant, it does not follow that this responsibility precluded the assignment of the tract in accordance with the terms of the deed. Rather, BIA's trust responsibility toward appellant extended only to appellant's limited interest in the tract. Once BIA exercised its power of appointment under the deed, Byron became the beneficiary of BIA's trust responsibility as it relates to this tract.

The deed granted the Secretary a power of appointment. As discussed above, a power of appointment gives the donee of the power discretion to determine the final disposition of the property covered by the power. In reviewing BIA decisions involving the exercise of discretion, the Board does not substitute its judgment for that of BIA, but rather reviews the decision to ensure that all legal prerequisites to the exercise of discretion were met. The Board has also held that the appellant bears the burden of showing that BIA has not properly exercised its discretion. See, e.g., McGough v. Sacramento Area Director, 28 IBIA 146 (1995), and cases cited therein. The Board sees no reason to depart from these practices because the source of BIA's discretionary authority is a deed rather than a statute or regulation.

Substantively, appellant contends that the decision was arbitrary and capricious, asserting that "the Area Director has made an ad hoc decision

to assign away tribal trust land after conducting a minimal factual inquiry which overlooked potential impacts on [appellant]" (Opening Brief at 17), apparently including "its land base, or the economic or cultural importance of the tract to" it. Id. at 6. Appellant does not further discuss in its opening brief what potential impacts it believes the Area Director overlooked, or what economic or cultural importance the tract has to it.

In its reply brief, however, appellant alleges that

[a]pproximately 8,000 acres of land within the Nation were acquired under the "Scattered Tracts Project." [7/] Many of these deeds contained language similar to that in the present case. [Appellant] is entitled to greater stability in its land holdings and should not have a constant threat of losing its lands through issuance of BIA "proclamations" to assignment of title.

(Reply Brief at 13).

As has been discussed, appellant's interest in Tract #56 was limited. Any "instability" in appellant's land holdings resulting from this decision arises from appellant's expectation that it would continue to hold the tract despite the deed's clear grant of authority to the Secretary to assign the tract to an individual Indian.

Appellant has provided no support for its assertion that the Area Director did not consider potential impacts on it, and has argued only that it should be able to retain the tract because it is entitled to stability in its land holdings. The Board concludes that these arguments are insufficient to carry appellant's burden of proving that BIA did not properly exercise its discretion.

Appellant also attacks the decision on several procedural grounds. Appellant contends that the decision violated its constitutional right to a hearing or opportunity to be heard. Because it has concluded that appellant was not deprived of a property interest when the tract was assigned to Byron, the Board also concludes that appellant did not have a constitutional right to a hearing.

7/ Exhibit 18 in the administrative record contains a list of those tracts within appellant's jurisdictional area which were acquired under the Scattered Tracts Project and which are still subject to deed provisions comparable to those in this case. The list shows a total of nine such tracts, containing 1,794.51 acres. Three additional tracts, totalling 310 acres, are also listed. See also Aug. 6, 1993, Letter from the Area Director to appellant's Principal Chief at 1.

Appellant does not discuss the apparent discrepancy between these figures and its statement that approximately 8,000 acres were acquired under the Scattered Tracts Project.

However, in any case, the administrative record shows that appellant was consulted before the Area Director issued his decision. Appellant contends that the Area Director decided to assign the property to Byron without notifying it that he was considering an assignment request from Byron. From the evidence in the administrative record, it appears to be technically correct that appellant may not have been notified that Byron had requested assignment of Tract #56. However, appellant does not dispute that the Area Director notified it of Naomi's request in the June 7, 1991, letter quoted supra, or that the Area Director stated that appellant's input would be used "in connection with the potential assignment of the remaining tracts." Area Director's June 7, 1991, Letter at 2. Appellant responded by enacting Resolution No. 70-92. It is disingenuous at best for appellant to suggest that it was deprived of a right to respond because it was not notified that the Area Director was considering assigning the tract to Byron, even though its input was specifically requested and given as to a possible assignment to Naomi.

Most importantly, appellant has had a full opportunity to present its position in this appeal. The Board has previously held that any procedural due process violations that might have been committed by a BIA Area Director by not ensuring that interested parties were notified of the pendency of an appeal, or by not allowing all interested parties an opportunity to respond, are cured in an appeal to the Board, in which all parties are allowed a full opportunity to present their positions. See, e.g., Meeks v. Aberdeen Area Director, 23 IBIA 200, 202 (1993); Jerome v. Acting Aberdeen Area Director, 23 IBIA 137, 138-39 n.1 (1993); Peace Pipe, Inc. v. Acting Muskogee Area Director, 22 IBIA 1, 6 (1992). Appellant has had a full opportunity to present its position to the Board. The Board concludes that, if any error was committed by the Area Director in not notifying appellant that he was considering a request for assignment from Byron, that error has been cured in this appeal.

Appellant also argues that even if the Secretary had authority to make this assignment, that authority has not been delegated to the Area Director. Appellant notes that the Area Director cited as authority for his decision 209 DM 8, Secretarial order 3150, as amended, and 10 BIAM Bulletin 13, as amended. Appellant argues that these delegations contain no express delegation of authority to assign or convey tribal trust lands acquired under the OIWA.

It appears that appellant's argument is that the Secretary's authority to assign the scattered tracts is not specifically mentioned in the delegations of authority. The Board agrees that the delegations do not mention this authority. However, the documents are written so that all authority, except that specifically exempted, is delegated and/or redelegated. The Board rejects this argument.

Finally, appellant argues that the assignment violates the Administrative Procedure Act, 5 U.S.C. §§ 551(4) and 552, because the Area Director failed to publish regulations concerning the assignment of the Scattered

Tracts, and that it cannot be adversely affected "by the BIA's unpublished 'hidden' rules" (Reply Brief at 10). In essence, appellant contends that the tract cannot be assigned because the Secretary has not published regulations controlling his exercise of the discretion granted to him in the deed.

The Board cannot conclude that the exercise of a power of appointment--the essence of which under the law of property is the discretion given to the donee of the power to consider the entire situation when the power is exercised--constitutes a "rule" within the meaning of section 551(4).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 11 and 28, 1994, decisions of the Acting Muskogee Area Director are affirmed. 8/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

8/ Appellant asserts that "the key factor [in the assignment decision] has been consideration of the 'relationship of each requesting party to the life tenant.'" Reply Brief at 9; quotation from the Area Director's Answer Brief at 7. Appellant appears to believe that, if this assignment stands, the remaining tracts will also be assigned to individual Indians.

The Board finds no evidence that the "key" factor in the Area Director's decision was the relationship to the life tenant. Instead, it finds that that relationship was "a" factor in the decision. The Area Director specifically acknowledged that each request for assignment would be considered on its own merits. This opinion affirms and requires that individualized consideration.

All arguments not specifically mentioned were considered and rejected.